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Law Research Institute Research Paper Series

CLPE Research Paper 4/2005

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Maintaining Sovereignty, Balancing Security Interests & Civil
Liberties in Canadian Immigration Policy-Making

Keywords: globalization, borders, terrorism

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Alison Forrest

THE CANADA/U.S. DYNAMIC POST 9/11: MAINTAINING SOVEREIGNTY, BALANCING SECURITY INTERESTS & CIVIL LIBERTIES IN CANADIAN IMMIGRATION POLICY- MAKING

Abstract: This paper is a part of a larger research project that looks at the balancing of security interests and civil liberties in Canadian immigration policy-making post 9/11. The argument presented in this paper counters the frequently proposed assertion that Canadian policy-makers are unduly influenced by U.S. policies and politics in this area. Rather, it will be argued, Canadian sovereignty is asserted through active co-operation with the U.S. in such policies as the Smart Border Agreement, Integrated Border Enforcement Teams, and Safe Third Country Agreement. Through this active co-operation with the U.S. the Canadian Government is able to assure the U.S. of its ongoing commitment to security issues, while diverting American interest from more extreme measures such as the proposed perimeter security project.

A further argument demonstrates that the very different Constitutions and political traditions of the U.S. and Canada necessarily result in very different responses to the terrorist threat. In Canada there is active public debate around the balancing of security interests and civil liberties, an independent judiciary, and independent review agencies operating at arms'-length from the executive, while in the U.S. the system of constitutional checks and balances has effectively broken down. The Canadian response to the terrorist threat – including immigration policies -- is not perfect, but it a genuine Canadian-made product.

I. INTRODUCTION

This paper will analyze and challenge the assertion that Canadian immigration policy, along with security policies, post 9/11 is unquestionably following the U.S. lead. It will argue that this perception is based in a deep-rooted and long-held fear held by many Canadians that has found expression in such polemics as George Grant's *Lament for a Nation: The Defeat of Canadian Nationalism*.¹ According to this argument, Canada is but an outpost of American cultural imperialism, its political life a puppet of U.S. dictates, and its economy a combination of G.M. plants and American chain-stores. As a result, the argument urges, Canada is no longer a sovereign state and Canadian nationalism is a thing of the past. Grant's lament was published in 1965 following the Cuban missile crisis, and cites the U.S. entry into World War II as the beginning of the end for Canada's long-held tie and identification with British values, and their transference to those of its southern neighbour. Forty years after Grant's text was published and the charge is still being made: Canada's response to post 9/11 security concerns, alarmists urge, mirror those of the U.S. These policies are an unthinking and reflex response to U.S. calls for heightened security against possible future terrorist threats, and Canadian policy-makers simply follow in the wake of U.S. leadership.

It is true that the security regime that Canada has installed post 9/11 has done little to dispel these fears and anxieties. Canada's security regime looks remarkably similar to that of the U.S.: they have the newly-formed umbrella organization, the Department of Homeland Security, and we have the Department of Public Safety and Emergency Preparedness; they have the *U.S.A. Patriot Act*² and *Homeland Security Act of 2002*³ and we have the

¹ George Grant, *Lament for a Nation: the Defeat of Canadian Nationalism* (Toronto: McClelland and Stewart in association with the Institute of Canadian Studies, Carleton University, 1965). See also, Richard Gwyn, *Nationalism Without Walls: The Unbearable Lightness of Being Canadian* (Toronto: McClelland and Stewart, 1995); Seymour Martin Lipset, *North American Cultures: Values and Institutions in Canada and the U.S.*, Borderlands Monograph Series #3 (Borderlands, 1990); and, more recently, the national bestseller by Michael Adams with Amy Langstaff and David Jamieson, *Fire and Ice: the United States, Canada and the Myth of Converging Values* (Toronto: Penguin, 2003) that seeks to explode this persistent myth.

² *U.S.A. Patriot Act*, Pub. L. No. 107-56, 115 Stat. 272 (2001).

³ *Homeland Security Act of 2002*.

*Anti-terrorism Act*⁴ and the *Public Safety Act*⁵; they have incorporated immigration and refugee issues under the umbrella organization alongside security and policing issues, and so too has Canada. Furthermore, there is clear evidence of the desire on both side of the Canada/U.S. border to co-ordinate security practices between the two nations, while at the same time facilitating the movement of people and trade cross-border. Two recent statements pointing to this mutual desire make this clear. The first was issued in a news release from the Hon. Mr. Martin, Prime Minister of Canada's office, dated November 30, 2004, "Joint Statement by Canada and the United States on common security, common prosperity: A new partnership in North America" following President George W. Bush's meeting with the Hon. Paul Martin.⁶ The news release speaks to this "new partnership" as providing "improv[ed] co-ordination of intelligence-sharing, cross-border law enforcement and counter-terrorism" in the effort "to protect our citizens and promote democracy, human rights, prosperity, economic opportunities, and the quality of life".⁷ And, second, this "joint approach to partnerships, consensus standards, and smarter regulations"⁸ was reiterated and built upon most recently in March 2005 following the meeting of Prime Minister Martin with U.S. President George W. Bush and Mexican President Vicente Fox at Baylor University in Waco, Texas. The news release, "Security and Prosperity Partnership of North America Established" issued from this meeting signaled the intent to extend this partnership across North America to include Mexico. The publication of an interim report by the Canadian federal government's Policy Research Initiative last December, "Canada-U.S. Regulatory co-operation: Charting a Path Forward", part of its broader North American Linkages programme, and urging greater regulatory co-operation between Canada and the U.S. further underscores the move in

⁴ *Anti-terrorism Act*, 2001, c.41.

⁵ *Public Safety Act* 2002, 2004, c-15.

⁶ News Release, "Joint statement by Canada and the United States on common security, common prosperity: A new partnership in North America", Office of the Prime Minister, November 30, 2004, Ottawa, website, <http://pm.gc.ca/eng/news.asp?id=341>.

⁷ News Release, "Joint statement by Canada and the United States on common security, common prosperity: A new partnership in North America", Office of the Prime Minister, November 30, 2004, Ottawa, website, <http://pm.gc.ca/eng/news.asp?id=341> at 1.

⁸ *Ibid.* at 2.

this direction.⁹ This co-operation would see Canada and the U.S. develop similar regulations in order to facilitate trade.

Some of the paranoia generated by the overt steps of Canada towards these closer relations with the U.S. – and Mexico – derive (again) from long-standing concerns that the NAFTA treaty signals the end of Canadian sovereignty.¹⁰ Many Canadians feel that the fear of terrorism has supplied the opportunity for precipitating and accelerating ties – especially economic and political ties – with the U.S.: the same close relationship advocated by an earlier generation of political conservatives such as the C.D. Howe Institute, and now heard again.¹¹

Policies such as the Safe Third Country Agreement signed by Canada and the U.S. bring into play issues of national sovereignty and fear of U.S. influence in domestic policies and politics. Their insertion in the heart of security interests on both sides of the border necessarily raises a red flag. Immigration (and refugee) policies are an important aspect of determining a nation's identity: they determine who is 'in' and who is 'out'. Hence, by their very nature these policies are highly political. And in a post 9/11 reorganized government structure where these policies sit alongside security and policing matters, their political nature is even more apparent. Catherine Dauvergne reflects on this political nature of immigration and refugee laws in the following way:

⁹ "Canada-US Regulatory Co-operation: Charting a Path Forward", Policy Research Initiative Canada, Interim Report, PRI Project, North American Linkages, December 2004.

¹⁰ Newspaper articles such as that of the *Globe & Mail*'s April 6, 2005 article, "Possible U.S. ambassador to Canada close with Bush" underscore these concerns page (A13). The article discusses the front-runner to the position of U.S. ambassador to Canada, David Wilkins, as knowing little about Canada or for that matter international or trade relations, but as being essentially a political appointee (as is typical of these appointments) rather than a career diplomat. His close relations with the Bush family is discussed extensively and the message is clear: this is yet another way to forge closer ties between the U.S. and Canada. Furthermore, statements such as those made by the Hon. Irwin Cotler in an article discussing Bill C-36, the *Anti-terrorism Act*, emphasize the differences between the U.S. and Canada only seem to erode confidence in Canadian independence, rather than assert an argument in support of it: "Terrorism, Security and Rights: the Dilemma of Democracies", (2002) 14.1 *National Journal of Constitutional Law*, pp. 55ff.

¹¹ See, for example, Alan S. Alexandroff and Don Guy, "What Canadians Have to Say About Relations With the United States", C.D. Howe Institute Backgrounder, Border Papers, No. 73, July 2003 <www.cdhowe.org>

We define ourselves through our immigration law, more than through any other legal text, including our citizenship law and our constitution. With this law we bring into existence the group for whom the constitution is then interpreted and infused with meaning, as well as the eligibility group of potential new citizens.¹²

Dauvergne goes on to explain how these policies create a national border and, in so doing, constitute the nation and national interest:

In order for the nation to exist, for there to be a community, there must be a boundary.....Although the border “exists” as an image on a map, what makes it meaningful are the legal texts that protect and defend it. Immigration law is not the only law involved here, but it is the key one when people rather than things or money are crossing borders. One reason why the concept of “national interest” is so vital to immigration law is because of the role this law plays in constituting the nation. A principal function of immigration law is to establish the conditions under which there can be a national interest.¹³

It is this drawing of a boundary, of demarcation, of national interest that makes immigration law and all matters pertaining to immigration law so highly contested, especially post 9/11. Immigration law and policy speak to a nation’s, Canada’s, ability to define itself and to assert its sovereignty as a nation.

But does this all necessarily add up to the loss of Canadian sovereignty, the end of Canadian nationalism? This paper will argue that it does not. The concerns expressed are valid concerns, but they do not signal the end of Canadian values. They speak rather to the Canadian commitment to open

¹² Catherine Dauvergne, “Evaluating Canada’s New Immigration and Refugee Protection Act in Its Global Context”, December, 2003, 41 *Alberta L. Rev.* 725 at 741.

¹³ Catherine Dauvergne, “Evaluating Canada’s New Immigration and Refugee Protection Act in Its Global Context”, December, 2003, 41 *Alberta L. Rev.* 725 at 741.

debate around issues of such national importance as Canada's immigration and trade policies, its newly developed security measures post 9/11, and the concerns these security measures have precipitated, in their turn, that the end result will mean the compromising of human rights. This paper will argue that Canada's continuing independence from the U.S. derives from its very different political and social history, and the traditions and institutions that support it. Foremost amongst these institutions lies our Westminster system of government. It will be further argued that this very different system of government – including an activist, independent final court of appeal, the *Charter of Rights and Freedoms* and decisions based on it, a system of independent review agencies operating at arms-length from the executive -- and the political culture that incorporates a dynamic and genuine dialogue between the government and those governed, all support the contention that Canada continues to follow its own lead in responding to the 9/11 terrorist attacks, and not those of the U.S. The paper proposes to demonstrate these contentions by focusing on the following: (1) the different constitutional structure and political traditions of the U.S. and Canada; (2) an independent judiciary that draws upon the *Charter*, international case law and international human rights conventions; and (3) strategic reasons for (some) closer Canada-U.S. ties.

II. CHECKS AND BALANCES: THE U.S. AND CANADIAN CONSTITUTIONS

The United States has a republican constitution and Canada a parliamentary constitution. As a recently published consultation paper issued by Public Safety and Emergency Preparedness Canada notes, this difference has important implications to the application of national security measures.¹⁴

Any discussion of US arrangements for review of security matters needs to take account of the radically different constitutional arrangements for government in that country. The United States is a republic with a system of government based on the separation of powers, unlike the Westminster systems, which are based on the responsibility of the

¹⁴ "A National Security Committee of Parliamentarians", A Consultation Paper to Help Inform the Creation of a Committee of Parliamentarians to Review National Security, Public Safety and Emergency Preparedness Canada, Ottawa 2004, http://www.psepc-sppcc.gc.ca/publications/national_security/nat_sec_cmte_e.asp at 10.

government and its fusion with legislature in the institution of Parliament. This means that in the United States the government is shared between the executive and the legislature, unlike in the Westminster system, where the government governs and is accountable to the legislature for its stewardship.

These constitutional differences have consequences. Congress does not *review* the actions of security and intelligence agencies, it has *oversight* of them. Congress works with the executive branch to regulate the operational agencies, giving approval for matters that in Westminster governments fall clearly under the responsibility of ministers. There is even provision for select leaders in Congress to be consulted about proposed covert activities.¹⁵

As the consultation paper concludes, the Australian, New Zealand and United Kingdom experiences are more pertinent to Canada than that of the United States:

There is a remarkable degree of similarity in the evolution of Parliament's role in respect of national security over the past twenty years in Australia, New Zealand and the United Kingdom. Those similarities extend no less to Canada. The experience of the United States has been considerably different, reflecting the fundamental differences between the republican and parliamentary constitutional systems and experiences, including the absence from the US system of independent review agencies operating at arms'-length from the executive. Moreover, the obligations of the President to provide information, and of the Congressional committees to oversee intelligence matters add up to much more than a

¹⁵ "A National Security Committee of Parliamentarians", A Consultation Paper to Help Inform the Creation of a Committee of Parliamentarians to Review National Security, Public Safety and Emergency Preparedness Canada, Ottawa 2004, http://www.psepc-sppcc.gc.ca/publications/national_security/nat_sec_cmte_e.asp at 10. Italics in text.

review function, reflecting the very different constitutional arrangements in the United States.¹⁶

The Hon. Irwin Cotler, in commenting on the difference between the U.S. and Canadian security measures post 9/11, notes that “U.S. anti-terrorist measures have undermined fundamental human rights principles and protections that have characterized the American constitution for more than 200 years...”¹⁷ The first two principles he lists are the “separation of powers principles with its attendant checks and balances” and the “open government principle – of the people, for the people, by the people.”¹⁸ Cotler argues that the first of these principles, the separation of powers, is based on a supposition of “diffusion of power amongst the three branches of government” which includes the sharing of information such that each branch can monitor the other two, and the constitutional boundaries between them are respected.¹⁹ This system of mutual monitoring and respect for boundaries has broken down, he argues, as a result of the executive’s refusal to share information with the other two branches of government, “including the withholding of information from congressional oversight committees”,²⁰ as well as the withholding of “relevant information from the judiciary.”²¹

The second constitutional principle to be violated by the U.S. government’s anti-terrorist measures – the open government principle (of the people, for the people, by the people), Cotler states, is founded in the U.S. Constitution’s presupposition of “the vigilance of an informed citizenry as the ultimate check on arbitrary government and the guarantee of democratic government.”²² In support of this, two statutes were passed: the *Freedom of Information Act*²³ and the *Whistleblower Protection Act*.²⁴ However, one month after the terrorist attacks on U.S. soil, Attorney General John Ashcroft encouraged “the presumptive *refusal* of requests for information” in a memorandum sent out to all federal departments, whether or not they had

¹⁶ *Ibid.* at 11.

¹⁷ Irwin Cotler, “Terrorism, Security and Rights” 14 *NJCL* at 56.

¹⁸ *Ibid.*

¹⁹ Irwin Cotler, “Terrorism, Security and Rights” 14 *NJCL* at 57.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ *Freedom of Information Act*, 5 U.S.C. & 552 (1966) [hereinafter *FOI Act*]

²⁴ *Whistleblower Protection Act*, 5 U.S.C. & 2303. *Ibid.* at 57.

any relation to security issues.²⁵ As Cotler notes, this move is a direct reversal of the *FOI*'s presumption that every citizen has a "*right* to access government information."²⁶

II.1 DIFFERENT CONSTITUTIONS/DIFFERENT POLITICAL TRADITIONS

All of this is not to say that Canada's record in the application of security measures post 9/11 is exemplary. It is just different from that of the United States. And this difference speaks to the different Constitutions of the two countries that allow for such astonishing constitutional violations on the part of the executive in the U.S. that have not occurred in Canada. These same constitutional violations, I would argue, have not and cannot occur in Canada with its very different Constitution, and the checks and balances this Constitution entails. Likewise, the strong tradition of democratic participation of the Canadian people appears to work in this country in a way that it does not south of the border. One example, as Ronald J. Daniels notes in the introduction to the text, is the publication of *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill*,²⁷ which was produced following a two-day public conference held to debate Bill C-36 (*Anti-terrorism Bill*). Daniels describes the essays as:

[I]mportant contributions to the very necessary democratic debate about Bill C-36. This robust democratic process honours our free and democratic society and distinguishes it from those who would use violence and weapons, not essays and speeches, for political ends. The commentators in this book have brought their varied expertise, experience and perspectives to bear on the many parts of the government's omnibus bill in an incredibly short time. They have discharged their duties as both citizens and academics in a most admirable way. I am very proud to have been associated with the collective effort necessary to produce such learned and thoughtful commentary that can contribute

²⁵ Irwin Cotler, "Terrorism, Security and Rights" 14 *NJCL* at 57. Italics appear in text.

²⁶ *Ibid.* Italics in text.

²⁷ Ronald J. Daniels, Patrick Maklem, and Kent Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001).

so directly to debates that are fundamental to both our security and our freedom.²⁸

This open and public debate is certainly at odds with the lack of information given citizens in the U.S., as noted by Cotler, above.²⁹ And it is at odds with the fact that the *U.S. Patriot Act* was enacted “without debate or discussion, either in the congressional arena or amongst the public.”³⁰ The enactment of the American Legislature was “without public hearings or witness testimonies”, by contrast with the Canadian process³¹ that saw the engagement with security issues by academics, civil libertarian groups and NGOs, minority interest groups, newspaper articles and commentary, and other media, all speak to a strong commitment to, and practice of, democratic government.

II.2 CIVIL LIBERTIES

Kate Martin similarly describes the U.S. in her contribution to the collection, *Terrorism, Law, and Democracy: How is Canada Changing following September 11?*³² She argues that many of the security measures implemented by the U.S. in response to 9/11 “have the effect of concentrating power in the hands of the executive branch of the Government, while diminishing its accountability to the legislature, the judiciary and the public.”³³ This together with the secrecy under which government action occurs excludes the public from knowledge of government action. This is a cause for concern. These government directives are generated by the *Patriot Act* and include inadequate due process protection of detained immigrants such that standards are not set out for the Attorney General “in making and reviewing

²⁸ *Ibid.* at 18.

²⁹ This is not to suggest that the U.S. lacks public debate on these important matters, or that the Canadian public has unfettered access to highly sensitive government information, but suggests, rather, that the difference lies in a matter of degree of openness: Canada’s debate takes place in a tradition of openness, while the U.S. has adopted one of secrecy.

³⁰ Irwin Cotler, “Terrorism, Security and Rights” 14 *NJCL* at 67.

³¹ *Ibid.*

³² Kate Martin, “Civil Liberties and the U.S. Government Response to September 11”, in *Terrorism, Law, and Democracy: How is Canada Changing following September 11?* published by the Canadian Institute for the Administration of Justice, Montreal: Les Editions Themes Inc., 2002), at 81ff.

³³ *Ibid.* at 81.

the decisions to certify an individual as a suspected terrorist” and likewise does not “provide guidance to the courts on what evidence it should consider in assuming the justification of the Attorney General’s decision or whether the detainees will have access to the evidence on which such decisions are based.”³⁴ Furthermore, an order issued by the Attorney General under the authority of the *Patriot Act* directed the Justice Department “to monitor the conversations between individuals being detained by the Government and their lawyers if the Attorney deemed them terrorists.”³⁵ As Martin notes, this monitoring undermines the confidential lawyer-client relations so violating detainees’ First Amendment right to access the courts, their Sixth Amendment right to effective assistance to counsel, and the Fourth Amendment when it violates federal wiretapping statutes.

Due process rights were abrogated when over one thousand individuals were placed in secret detention by the U.S. Administration immediately following 9/11, and the Justice Department refused to make public the names of those arrested.³⁶ Only after congressional and public pressure did the Justice Department release the names of those charged with federal crimes.³⁷ As a result, a court case has been filed under the *FOI Act* by the Center for National Security Studies and others.³⁸ This further bolsters public concerns that the Government has abandoned the constitutional requirements that “an individual may only be arrested when there is probable cause to believe he is engaged in criminal activity”, but now seeks to jail individuals until FBI clearance is achieved.³⁹

A further violation of First Amendment rights is alleged by the *in camera* proceedings of all immigration cases where individuals were secretly

³⁴ Kate Martin, “Civil Liberties and the U.S. Government Response to September 11”, in *Terrorism, Law, and Democracy: How is Canada Changing following September 11?* published by the Canadian Institute for the Administration of Justice, Montreal: Les Editions Themes Inc., 2002) at 84.

³⁵ *Ibid.*

³⁶ *Ibid.* at 85.

³⁷ *Ibid.*

³⁸ *Ibid.* See 5 U.S.C. & 552.

³⁹ Kate Martin, “Civil Liberties and the U.S. Government Response to September 11”, in *Terrorism, Law, and Democracy: How is Canada Changing following September 11?* Published by the Canadian Institute for the Administration of Justice, Montreal: Les Editions Themes Inc., 2002) at 87.

arrested in connection with terrorist investigation by order of the Attorney General.⁴⁰ Again, court cases alleging a violation of due process rights have emerged from this decision. Finally, President Bush issued a Military Order authorizing the creation of military commissions to try non-citizens alleged to be involved in international terrorism against the U.S., and authorizing the indefinite detention of non-citizens deemed terrorists.⁴¹ This order was criticized as violating the *International Covenant of Civil and Political Rights* that guarantees a trial by an independent and impartial tribunal.⁴² The order was further criticized as being outside the President's constitutional authority: it set up military tribunals, rather than authorizing trials of suspected terrorists by existing military courts martial.⁴³ And military tribunals, like the civilian court system, involve judicial power that, according to the Constitution, is vested in the Supreme Court and such inferior courts created by Congress. A military tribunal, then, can only be authorized by the Constitution or by Congress, and not by the President.⁴⁴ The Military Order further violates many basic due process rights including the right to be presumed innocent, allowing evidence that would not be allowed in civilian courts, government authority to use secret evidence in some instances that it would not even be required to show to judges, and so on.⁴⁵ Additionally, there would also be a presumption of secrecy, in contrast to the constitutionally mandated open judiciary.⁴⁶

II.3 INDEPENDENT JUDICIARY OR 'MERE ERRAND BOY'?

An important effect of the breakdown in checks and balances in the U.S. government is the intrusion of the executive in the judiciary whereby (1) the executive is involved in directing judicial decision-making, and (2) the judiciary displays a high degree of deference to the executive in foreign affairs. Beth Stephens explores this phenomenon in the U.S. in her 2004

⁴⁰ *Ibid.* at 88.

⁴¹ Authorized November 13, 2001. *Ibid.* at 89.

⁴² *Ibid.* at 90.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ Kate Martin, "Civil Liberties and the U.S. Government Response to September 11", in *Terrorism, Law, and Democracy: How is Canada Changing following September 11?* Published by the Canadian Institute for the Administration of Justice, Montreal: Les Editions Themes Inc., 2002) at 91.

⁴⁶ *Ibid.*

article, "Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation."⁴⁷ Stephens argues that this has had a negative impact on human rights litigation. This has occurred in the following way:

The administration of President George W. Bush has launched a concerted effort to overturn a groundbreaking line of cases, established under the *Filartiga* doctrine, permitting human rights litigation in U.S. courts. Relying on the *Alien Tort Claims Act (ATCA)*, the *Filartiga* doctrine authorizes victims of egregious human rights abuses to seek damages in U.S. federal courts through civil lawsuits. These human rights lawsuits contribute to the worldwide movement for accountability by exposing abuses committed by private individuals, corporations and government officials, and by compensating victims.⁴⁸

The earlier Carter and Clinton administrations supported the *Filartiga*⁴⁹ doctrine. However, the Bush administration has "strenuously opposed human rights litigation, intervening in a dozen cases to challenge both the modern interpretation of the *ACTA* and its application in particular cases."⁵⁰ This has been justified on the basis that judicial review of gross human rights cases "constitutes an unconstitutional interference with executive branch foreign affairs powers."⁵¹ Furthermore, the U.S. government has insisted that the judiciary refrain from judicial review whenever it asserts that foreign policy would be harmed through litigation.⁵² Stephens cites Justice Douglas's warning made over thirty years ago, that to allow the executive "unfettered power to determine when litigation must be dismissed on foreign policy grounds...would render the court "a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from

⁴⁷ Beth Stephens, "Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation", Spring 2004, 17 *Harv. Hum. Rts. J.* 169.

⁴⁸ *Ibid.* at 169.

⁴⁹ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

⁵⁰ Beth Stephens, "Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation", Spring 2004, 17 *Harv. Hum. Rts. J.* 169.

⁵¹ *Ibid.*

⁵² Beth Stephens, "Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation", Spring 2004, 17 *Harv. Hum. Rts. J.* at 169-170.

the fire, but not others.”⁵³ She states that although the Constitution gives the President and Congress the leading roles in foreign affairs, judicial review of foreign affairs cases is not prohibited.⁵⁴ The division of foreign affairs powers, as currently practiced by the Bush administration, clearly opposes the Constitutional assignment of powers and duties among the three branches of government, to the detriment of judicial independence.

Concerns with judicial deference to government decision-making are certainly not unheard of in Canada. We saw these concerns expressed in *Suresh v. Canada (Minister of Citizenship and Immigration)*⁵⁵. This case involved a Tamil of Sri Lanka who was recognized as a Convention refugee by the IRB, and applied for landing under the *Immigration Act*. The Solicitor General issued a certificate alleging the applicant was inadmissible under the *Act*, and was a fundraiser for a terrorist organization. The Minister issued a danger opinion under the *Act* and the applicant challenged this under s.7 *Charter*, the right to life, liberty and security:

s.7 Everyone has the rights to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.⁵⁶

The appeal asked the Supreme Court of Canada to consider a number of issues: (1) the standard of review to be applied in a Minister’s deportation order; (2) if the *Charter* precludes deportation where torture or death may await a refugee; (3) if deportation based on “mere membership” of an alleged terrorist organization unjustifiably infringes the *Charter* rights of freedom of expression and freedom of association; (4) whether the terms “terrorism” and “danger to the security of Canada” are unconstitutionally vague; (5) whether adequate procedural safeguards exist in the deportation scheme such that

⁵³ *Ibid.* at 170. Quoting Douglas J. from *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 773 (1972), Douglas J. concurring.

⁵⁴ *Ibid.*

⁵⁵ *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 Can. Sup. Ct. LEXIS 4; 2002 SCC1 [hereinafter *Suresh*].

⁵⁶ *Charter* s. 7, *Suresh*. The applicant was able to do this following the SCC decision *Singh v. Minister of Employment and Immigration*, [1985] 1 SCR 177 that stands for the proposition that non-Canadians as well as Canadian citizens are protected by s.7 *Charter* rights. What this means is that a non-Canadian may cite the right to life, liberty and security in making a case against a deportation order, amongst other things.

adequate procedural safeguards exist to ensure refugees are not deported to risk torture or death.⁵⁷

The Court went on to outline the meaning and importance of these issues:

The issues engage concerns and values fundamental to Canada and indeed the world. On the one hand stands the manifest evil of terrorism and the random and arbitrary taking of innocent lives, rippling out in an ever-widening spiral of loss and fear. Governments, expressing the will of the governed, need the legal tools to effectively meet this challenge.

On the other hand stands the need to ensure that those legal tools do not undermine values that are fundamental to our democratic society – liberty, the rule of law, and the principles of fundamental justice – values that lie at the heart of the Canadian constitutional order and the international instruments that Canada has signed. In the end, it would be a Pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to those values. Parliament’s challenge is to draft laws that effectively combat terrorism and conform to the requirements of our Constitution and our international commitments.⁵⁸

The Court concluded that:

...to deport a refugee to face a substantial risk of torture would generally violate s.7 of the Charter. The Minister must exercise her discretion to deport under the Immigration Act accordingly. Properly applied, the legislation conforms to the Charter. We reject the arguments that the terms “danger to the security of Canada” and “terrorism” are unconstitutionally vague and that ss. 19 and 53(1)(b) of the Act violate the Charter guarantees of free expression and free

⁵⁷ *Suresh*, at para 2.

⁵⁸ *Suresh*, at paras 3 and 4.

association, and conclude that the Act's impugned procedures, properly followed, are constitutional.⁵⁹

Applying these findings to the case at bar, the Court found, however, that Suresh made a *prima facie* case of substantial risk of torture if deported to Sri Lanka, and his hearing was found not to have provided the procedural safeguards required to protect his right not to be expelled to a risk of torture or death.⁶⁰ The result was that Suresh was to remain in Canada until a new hearing was heard.

Suresh stands for the finding that the right not to be deported if torture is likely to take place is not unequivocal under Canadian case law. Some critics feel that this case allowed undue deference by the judiciary in government decision-making around security issues. They urge a stronger message, an unequivocal message, be given in support of human rights in these instances such that Canada would not deport a terrorist to a country to face torture or death. However, this decision results from another form of deference from that shown by the U.S. judiciary where the executive dictated the results of human rights litigation or simply removed cases from the agenda on the grounds of risk to the conduct of foreign affairs. The Canadian judiciary continues to work independently of the other branches of government, even if Canadian do not always agree with the decisions rendered by the court, and it continues to maintain its right to do so.

As we have seen, the Canadian *Charter of Rights and Freedoms* plays a key role in ensuring a balance is struck between the government's mandate to implement security measures and the upholding of civil liberties. An independent court plays an important part in this. Stanley A. Cohen elaborates on the role of the court and the *Charter* in his article, "Safeguards in and Justifications for Canada's New Anti-terrorism Act",⁶¹ arguing that the "values [the Charter] espouses are fundamental and should not be denigrated. It has made a difference to [the *Anti-terrorism Act*] and to the process that produced it."⁶² Cohen further argues that the Supreme Court of Canada "has recast the rule of law as now embodying a "culture of

⁵⁹ *Ibid.* at para 5.

⁶⁰ *Ibid.* at para 6.

⁶¹ Stanley A. Cohen, "Canada's New Anti-Terrorism Act", (2003) 14.1 *N.J.C.L.* 99.

⁶² *Ibid.* at 100-101.

justification” under the *Charter*.⁶³ Government legislation, including security measures, must meet *Charter* challenges face-on. Such legislation must meet a *Charter* test for balancing security interests against other rights. And, in the process, the court has a solid history of looking to international courts and to international human rights treaties and conventions in reaching a decision. This is a far cry from the court described in Stephens’ article, above.

II.4 CANADIAN SOVEREIGNTY THROUGH CROSS-BORDER CO-OPERATION

The constitutional differences and different political traditions between the two countries may be acknowledged, but the similarities between U.S. and Canadian security measures that we noted earlier – legislation and increasing co-ordination and cooperation of cross-border regulatory measures – appear to mock this difference. Reg Whitaker offers an insightful perspective on reconciling these apparent contradictions in his article, “Keeping Up With The Neighbours? Canadian Responses to 9/11 in Historical and Comparative Context.”⁶⁴ As the title of his article suggests, placing the events post 9/11 in historical perspective offers some insight into Canadian policy-making and what this means for Canada/U.S. relations. Whitaker argues that the Canadian response post 9/11 is not to be regarded as an aberration in Canadian policy-making, or as an indication of Canada mindlessly following U.S. lead, but rather should be viewed as an ongoing Canadian strategy to protect Canadian sovereignty and economic security from the unintended consequences of U.S. actions.⁶⁵

Whitaker provides the following two examples to demonstrate that Canada has a previous history of negotiating internal and external pressures to effectively deal with terrorist threats, and the measures that it has deemed necessary to quash them.⁶⁶ As evidence of this, he points to Canada’s

⁶³ *Ibid.* at 101.

⁶⁴ Reg Whitaker, “Keeping up with the Neighbours? Canadian Responses to 9/11 in Historical and Comparative Context”, Summer/Fall 2004, 41 *Osgoode Hall L.J.* 241.

⁶⁵ As Canada’s major trading partner, economic/trading issues are necessarily of crucial importance in government concerns with U.S. relations.

⁶⁶ Stanley Cohen, however, disagrees strongly with the view expressed here and elsewhere, that Bill C-36 can be compared with the *War Measures Act* and the Canadian government’s response to the FLQ. He urges that Bill C-36 is a gentler and kinder form of legislation with built in checks and balances that were missing from the *War Measures Act*, and that it is

experience in the Cold War where the *War Measures Act* was engaged and civil liberties compromised. A further example is cited in the October 1970 crisis when “Canada faced its worst internal security crisis, when calls of the violent separatist group, *Le Front de Liberation du Quebec* (FLQ) kidnapped the British Trade Commissioner, James Cross, and kidnapped and later murdered the Quebec Minister of Labour, Pierre Laporte.”⁶⁷ Once again, the government invoked the *War Measures Act* citing charges of apprehended insurrection, and the federal government placed Quebec under, Whitaker argues, “what amounted to a state of martial law.”⁶⁸ These powers involved the extensive use of the “power to detain and interrogate without charge, without counsel, and without habeas corpus.” In addition, the media were censored and the FLQ declared a banned organization, while affiliation with the organization was banned and such affiliation made retroactive.⁶⁹ These were very much Canadian responses.

Returning to the events of post 9/11, Whitaker urges that the Canadian response may be seen to work on two fronts: (1) Canada reassures its allies of fulfilling its obligation to counter terrorism while also reassuring its citizens of ensuring their safety and (2) “damage limitation” whereby Canada’s economic interests remain unharmed through its participation in security on the Canada/U.S. border. The latter front operates so as to “reassure the United States sufficiently on border security so that commercial traffic can be maintained, while not surrendering a critical degree of Canadian sovereignty in the process.”⁷⁰ This has involved “more resources for security and intelligence; a streamlined decision-making structure within the federal government at both the political and bureaucratic levels; new and expanded legal powers for anti-terrorist law enforcement and investigation; and closer coordination and sharing of information with allies.”⁷¹ Further initiatives have been deemed necessary, however. These include the Smart

further misleading to treat them as of the same ilk. See Stanley A. Cohen, “Canada’s New Anti-Terrorism Act”, (2003) 14.1 *N.J.C.L.* at 100.

⁶⁷ Reg Whitaker, “Keeping up with the Neighbours? Canadian Responses to 9/11 in Historical and Comparative Context”, Summer/Fall 2004, 41 *Osgoode Hall L.J.* at 249.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ Reg Whitaker, “Keeping up with the Neighbours? Canadian Responses to 9/11 in Historical and Comparative Context”, Summer/Fall 2004, 41 *Osgoode Hall L.J.* at 254.

⁷¹ *Ibid.*

Border Agreements whereby U.S.-Canada cooperation allows for the pre-clearance of container traffic, the fast-tracking of safe persons and goods, the collection of data on persons crossing the border, high-tech surveillance, and expanded Integrated Border Enforcement Teams.⁷² Finally, the Safe Third Country Agreement was implemented in order to reduce the movement of refugees across the border.⁷³

Whitaker discusses this balancing act as a deliberate process whereby the Canadian government has shown “considerable skill and adroitness” of a “volatile process”, citing the ongoing references to Canada as a U.S. security breach as illustration of this point.⁷⁴ All of this, he urges, has been in an effort by the Canadian government to:

[try] to avoid being trapped into sweeping negotiations in a mega-agreement over a Fortress North America – such as the perimeter security project proffered by Paul Cellucci, the United States Ambassador to Canada, just after 9/11 (and endorsed by a number of provincial premiers, the Official Opposition in Ottawa, and the influential Council of Canadian Chief Executives. Instead, the Canadian government has engaged the Americans in a series of incremental negotiations, segmented but linked, the successful outcome of which have had the cumulative effect of mollifying American security concerns, while keeping the flow of cross-border commerce more or less intact. Absorbed in the specifics, the U.S. negotiators have lost sight of the larger picture, which is exactly to the taste of the Canadian negotiators who wished to minimize the larger loss of sovereignty necessarily entailed in any grander, macro-level integration and harmonization project.⁷⁵

Canada is left free to pursue security (and, by extension, immigration) legislation and to find judicial decisions consistent with its constitution and

⁷² *Ibid.* at 255.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ Reg Whitaker, “Keeping up with the Neighbours? Canadian Responses to 9/11 in Historical and Comparative Context”, Summer/Fall 2004, 41 *Osgoode Hall L.J.* at 254.

political and social mores, while satisfying the U.S. that it is cooperating fully on cross-border issues.

III. CONCLUSION

This paper has sought to demonstrate that Canada's ability to determine its own security and immigration policies post 9/11 remains unfettered by meaningful U.S. influence. The two countries have different constitutions and political traditions, and these have played out in very different ways post 9/11. While the U.S. post 9/11 has an overly powerful executive that intrudes on the judiciary and legislature and has developed a culture of secrecy, Canada struggles to work through democratic and constitutional solutions to the same problems.

The irrational fear that the Canadian government unthinkingly follows and emulates U.S. security – and immigration – practices is a part of what has been termed the “culture of security”, which harkens back to Grant's lament for a nation lost. In this post 9/11 “culture of security” we must be wary of being drawn into thinking that divides the world into good and evil.⁷⁶ Canadians need not fear the U.S. and its response to the threat of terrorism, as they do the threat of terrorism itself: what they need is an intelligent response to both. As Stephen J. Toope argues of terrorism, “Although terrorism must be fought strenuously, the fight must be intelligent and should not sacrifice the very values that we purportedly defend.”⁷⁷ Likewise, Canada needs to respond to the threat of terrorism, as well as the U.S. attack on terrorism, in an intelligent and thoughtful way. It is this ability to see all shades of grey that will allow us to continue to work towards a balancing of security interests and civil liberties in a way that is in keeping with Canadian values.

⁷⁶ Stanley A. Cohen, “Canada's New Anti-Terrorism Act”, (2003) 14.1 *N.J.C.L.* at 281.

⁷⁷ *Ibid.*